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No. 1178

IN THE

Supreme Court of the United States

October Term, 1967.

EDWARD FRANZEN,

Petitioner,

v.

THE TOWNSHIP OF ELK, a municipal corporation of the State of New Jersey; THE TOWNSHIP OF UPPER PITTSGROVE, a municipal corporation of the State of New Jersey; PHILIP FRANZEN, EMIL W. GALLAGHER and NAOMI A. GALLAGHER, his wife; and JOHN FRANZEN.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

APPENDIX.

JOSEPH PIERCE LODGE,
Apartment 11-P,
Northgate Apartments,
Camden, New Jersey 08102,
HENRY D. O'CONNOR,
1210 Bankers Securities Building,
Philadelphia, Pa. 19107,
Attorneys for the Petitioner.

Huntzinger Printing Corp., *Appellate Printers*, Camden, N. J.

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To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Edward Franzen, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of New Jersey, entered in this case on the 12th day of December, 1967.

OPINIONS BELOW.

The Opinion of the Chancery Division of the Superior Court of New Jersey, entered under date of January 14th, 1967, is set forth in the Appendix (C.-10a et seq.). The Opinion of the Appellate Division of the Superior Court, rendered on the 23rd day of October, 1967, is set forth in the Appendix (B.-2a et seq.), followed by the denial of Certification in the Supreme Court of New Jersey, dated on the 12th day of December, 1967 (A.-1a et seq.).

JURISDICTION.

The judgment of the Supreme Court of the State of New Jersey was entered on December 12th, 1967 (A.-1a-10).

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. A., Section 1257 (3), on the ground that the taking of the plaintiff's property, under the In Rem Tax Foreclosure Act of the State of New Jersey, which fails to provide for the service of notice on the owner, together with the failure to notify the plaintiff of any aspect of the procedure, violated the Constitution of the United States and deprived him of the right to hold and enjoy his property.

QUESTIONS PRESENTED.

Whether the taking of a plaintiff's property by an In Rem foreclosure proceeding, under the provisions of a statute providing only for service by publication and not for personal service on the landowner residing on the land violates a long line of decisions of this Court such as *New York v. New York Railroad Company*, 344 U. S. 293, and *Mullane v. Central Hanover Bank and Trust Company*, 339 U. S. 306, requiring personal service of process wherever possible and practical.

Whether lack of personal notice may be used by a co-tenant of property as a weapon in avoiding the obligations and responsibilities of the co-tenancy and transferring the property to others, who have notice of the recordation of the co-tenancy, thus depriving the other co-tenant of his rights in the property involved without due process of law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Fifth Amendment to the Constitution of the United States provides in pertinent part that no person shall "be deprived of life, liberty or property, without due process of law." The pertinent part of the Fourteenth Amendment to the Constitution provides that "nor shall any State deprive any person of life, liberty or property, without due process of law."

The statutes of New Jersey involved are the Taxation Act, Sections 54:4-23, as amended, 54:4-64, and 54:5-104.42, as amended, as set forth in the Appendix (D.-22a-5 et seq.).

STATEMENT OF THE CASE.

The basic facts, most of which have been adjudicated in the Opinions of the Chancery Division and of the Appellate Division of the Superior Court of New Jersey and are not in dispute, are that, in 1940, the farm property involved was conveyed to the plaintiff and to his brother, the defendant Philip Franzen (B.-3a-17 to 20); that part of the property is located in Upper Pittsgrove Township in Salem County and the remainder in Elk Township in Gloucester County, New Jersey (B.-3a-20 to 23); that, prior to 1950, the plaintiff and the taxing authorities of Upper Pittsgrove believed that the house and the building on the farm were actually located in that township (B.-3a-30 to 33), and that the Trial Court recognized that there had been a custom whereby, in rural areas where farm property was located in more than one municipality, the farm was taxed by the municipality in which the dwelling was located (B.-3a-27 to 31).

Plaintiff Edward resided in his parents' home until 1947, when he married and moved into the farmhouse (C.-11a-29 to 34). He received all his tax bills on the property from Upper Pittsgrove Township (Salem County), and he paid them (B.-3a-36 to B.-4a-5). Indeed, he never received a tax bill from Elk Township (Gloucester County), on this property (B.-4a-5, 6), although, as the Trial Court found, he owned other property situate partly in Elk and partly in Upper Pittsgrove, on which he received tax bills from Elk Township, which bills he had paid (C.-14a-12 et seq.).

Defendant Elk Township, in 1941, began to assess the portion of the farm property located within its borders (B.-4a-7 to 9), but the assessment was made in the name of the defendant Philip only (B.-4a-9 to 11) and all tax bills

were sent to Philip (B.-4a-10, 11), despite the fact that the deed of cotenancy had been recorded in both Salem County and Gloucester County (R. 274a and R. 275a). Plaintiff was unaware that his property was being assessed by Elk Township and thought the farm dwelling was in Upper Pittsgrove; he assumed, according to the decision of the Appellate Division in New Jersey, that the tax bills which he received from Upper Pittsgrove pertained to the whole farm, and he continued to pay those bills (B.-4a-14 to 18). This adjudicated assumption was fortified by the fact that, under a 1940 map, the farmhouse had been placed in Upper Pittsgrove Township (Salem County) (B.-5a-9 to 11). A survey made in 1949 showed the farmhouse to be in Elk (Gloucester County) (B.-5a-11 to 13) but the plaintiff received no notice, after the making of the survey, that there had been any change in the assessing or taxing procedures of the two townships (C.-14a-34 et seq.).

In 1945, Elk Township purchased a tax sale certificate on the farm for the unpaid taxes of 1944 and prior years (B.-4a-20 to 22) and, in 1952, proceeded to obtain title to the property by means of an In Rem tax foreclosure proceeding (B.-4a-22 to 24), of which the plaintiff Edward received no notice whatsoever (B.-4a-23, 24), by reason of the fact that the governing statute, applicable in 1952, Section 54:5-104.42 of the Taxation Act of the State of New Jersey (D.-23a-11 et seq.) provided only for notice by publication and not for the personal service of notice on the landowner or on the occupant. It is to be noted that the published notice was published only in the County of Gloucester (E.-23a-31 et seq.).

After Elk Township (Gloucester County) had acquired title to the farm as aforesaid, the defendant Philip, the cotenant, in 1954, bought the property from Elk for the sum of $2,000.00 (B.-4a-23, 24). In 1958 Philip conveyed the property to his father, the defendant John Franzen (B.-4a-31,

32). Four years later, in 1962, John conveyed the property to the defendant Emil W. Gallagher and his wife for the sum of $2,400.00 (B.-4a-32, 33), and it is to be noted that the Gallaghers did not obtain either a title search or a tax search prior to the purchase (B.-4a-34, 35).

The plaintiff's action for the restoration of title to his land was dismissed by the Trial Court (C.-17a-8 et seq.). At the same time the Trial Court adjudicated the existence of a conspiracy between Philip and John to deprive the plaintiff of his rights in the land (C.-19a-37 to C.-20a-14) and, accordingly, awarded the plaintiff compensatory damages against Philip in the amount of $1,200.00 and awarded punitive damages against both Philip and John in the amount of $500.00 (C.-20a-20 to 23). The Appellate Division, on the appeal, reduced the compensatory damages to $1,086.97 and affirmed the judgment of the Trial Court in all other respects (B.-9a-22 et seq.).

A petition in the New Jersey Supreme Court for certification to the Appellate Division was denied (A.-1a).

The due-process issue as to the lack of service of notice of the tax foreclosure was raised by the plaintiff in his complaint (R. 11a), was noticed by the Trial Court (C.-17a-8 to 15), was dismissed by the Trial Court (C.-17a-16 to 26), and was raised by the plaintiff, in connection with his lack of notice of other material facts, in his petition for certification in the Supreme Court of New Jersey, and was impliedly denied by the Supreme Court in the denial of certification (A.-1a).

ARGUMENT FOR GRANTING THE WRIT.

The plaintiff has been deprived of a valuable farm property without due process of law.

Legal procedure without notice, when notice can be given, like taxation without representation, defies justice. Notice and an opportunity to be heard, of the very essence of due process, are basic to our system of jurisprudence. The six facts, culminating in the adjudication depriving the plaintiff of his property were these:

1. He never received a tax bill from Elk Township (Gloucester County).

2. He received no notice of the assessment of the property by Elk Township: the assessment was made in Philip's name.

3. Edward received no notice that tax bills on the property were being sent by Elk Township to Philip.

4. Edward received no notice of the purchase of the Tax Sale Certificate by Elk.

5. The man had no notice of the In Rem tax foreclosure.

6. The man had no notice of the purchase of the property by Philip from Elk Township.

This totality of lack of notice must be considered in the light of the facts that the plaintiff, Edward, always paid his tax bills to Upper Pittsgrove Township (Salem County); that Edward had other property in Elk Township (Glouces-

ter County); that he received tax bills on such other property from Elk; that said bills were addressed to him at his residence in Monroeville, New Jersey (C.-14a-10 to 16), and that he paid the other tax bills to Elk. In the In Rem proceeding, the property was not posted, although occupied by the petitioner. There was only one newspaper advertisement of the proceeding (E.-24a).

A. Statutory duties to give notice were violated.

Section 54:4-23 of the Taxation Act (D.-24a-11 et seq.) places a duty upon the Tax Assessor to assess all real property to the person owning the same. No such assessment was made in Edward's name.

Section 54:4-64 of the Act (D.-22a-23 et seq.) creates a duty on the part of the Tax Collector to prepare, complete, mail or otherwise deliver tax bills to the individual assessed. No such tax bills were ever mailed or delivered by the Tax Collector of Elk Township to the plaintiff with regard to the property of which he has been deprived.

B. The Statute creating and controlling the In Rem foreclosure proceeding does not provide for any personal service on the owner of the property.

Section 54:5-104.42 of the Act, as amended by the Laws of 1948 (D.-23a-11 et seq.), provided in essence that "The copy of the Petition filed in the Office of the Recording Officer and the publication of the notice as hereinafter provided, shall be notice to the world." * * * "of the institution of said foreclosure proceeding In Rem, and that unless said lands be redeemed in the cause," * * * the rights of the persons involved "shall be foreclosed and forever debarred," etc. The filing of the copy of the Petition and the publication were the sole requirements: no personal service of

notice was required. On the bases of facts not to be found in the present case, the New Jersey Supreme Court upheld the constitutionality of this In Rem Act. (See *City of Newark v. Yaskel*, 5 N. J. 313, 74 A. 2d 883 (1950).)

Under the Fifth Amendment and the Fourteenth Amendment of the United States Constitution, a man cannot be deprived of his property without due process of law. Notice and opportunity to be heard are of the very essence of due process of law. To the point was the holding of this Court in the case of *New York v. New York Railroad Company*, 344 U. S. 293, motion to modify denied in 345 U. S. 901 (1953), where, in a railroad reorganization under the Bankruptcy Act, the Court ordered creditors to file their claims or be barred from participating; Section 77 (c) 8 of the Act provides that the judge should cause reasonable notice of the period in which claims may be filed to be given "by publication or otherwise." Mr. Justice Black ruled thus:

> "We hold that publication of the bar order in newspapers cannot be considered 'reasonable notice' to New York under the circumstances of this case.
>
> "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. See Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306."

The constitutionality of an In Rem Tax Foreclosure Act was attacked in the case of *Nelson v. City of New York*, 352 U. S. 103 (1956). However, the statute contained provisions which are not to be found in the New Jersey Act: the statute required that notice of the foreclosure proceeding be posted and published and a copy of the published notice mailed to the last known address of the owner of the property sought to be foreclosed; all these notice requirements were satisfied, but the property owner did not receive

actual notice because the notice was concealed by a trusted bookkeeper. Mr. Chief Justice Warren ruled,

> "the City having taken steps to notify appellants of the arrearages and the foreclosure proceedings and their agent having received such notices, its application of the statute did not deprive appellants of procedural due process."

The case of *Mullane v. Central Hanover Bank and Trust Company*, 339 U. S. 306 (1949), pertained to the constitutional sufficiency of notice to beneficiaries on the judicial settlement of the accounts of the trustee of a common trust fund. Wrote Mr. Justice Jackson,

> "Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. But the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified.
>
> "Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that 'The fundamental requisite of due process of law is the opportunity to be heard.' Grannis v. Ordean, 234 U. S. 385, 394. This right to be heard has little reality of worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."
>
> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pen-

dency of the action and afford them an opportunity to present their objections."

"But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

The statute provided only for notice by publication in a local newspaper, and Mr. Justice Jackson ruled,

"It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed."

With regard to the beneficiary whose place of residence was known (and it will be recalled that Elk Township sent many tax bills to the plaintiff Edward), Mr. Justice Jackson continued,

"As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post-office addresses of those affected by a proceed-

ing are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."

Publication alone will not satisfy constitutional requirements. If the New Jersey In Rem statute had provided for personal service, if the statute had provided for the posting of the notice on the property, the plaintiff would have had knowledge of the legal procedure in pendency and would have been able to protect his rights and to prevent his brother Philip from having bought and sold the property in violation of the well-settled law pertaining to ownership of property in co-tenancy and in violation of the public recordation of the fact of that co-tenancy.

The words "In Rem" contain no magical substitute for due process of law. In reality, the words "In Rem" constitute a misnomer, where the action is against property lawfully owned by an individual and the premises are not posted. "In Rem" applies only in those instances where there is no lawful right, in any individual, to ownership of the property being condemned or otherwise taken by the government.

The gross incongruity of the Trial Court's judgment would give one pause. The Trial Court took the plaintiff's property, a valuable farm property, away from him. At the same time the Trial Court found that the plaintiff's situation had been caused by a conspiracy against him, a conspiracy by his brother and by his father, a conspiracy of such a nature as to warrant the granting of punitive damages. Thus, the law has said to the plaintiff, "You are the victim of a conspiracy, but we will take your property away from you."

CONCLUSION.

To the end that the injustice perpetrated by means of deprivation of notice, in violation of constitutional decisions of this Court, may be thwarted, the petitioner prays that a Writ of Certiorari may issue to the Supreme Court of New Jersey.

Respectfully submitted,

JOSEPH PIERCE LODGE,
HENRY D. O'CONNOR,
Attorneys for the Petitioner.

APPENDIX A.

ORDER DENYING PETITION.

(Filed December 12, 1967.)

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 12th day of December, 1967.

A True Copy:
JOHN H. GILDEN,
Clerk of the Supreme Court.

Appendix B—Opinion of Superior Court of New Jersey, Appellate Division

APPENDIX B.

OPINION OF SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION.

(Original Filed 10-23-67.)

Argued September 25, 1967. Decided Oct. 23, 1967.

Before: JUDGES CONFORD, COLLESTER and LABRECQUE.

On Appeal from Superior Court, Chancery Division, Gloucester County.

MR. CARLTON W. ROWAND argued the cause for plaintiff Edward Franzen as appellant and cross-respondent.

MR. JOHN A. YACOVELLE, Jr. argued the cause for defendants Philip Franzen and John Franzen as respondents and cross-appellants.

MR. EUGENE P. CHELL argued the cause for respondent The Township of Elk (MESSRS. FALCIANI, COTTON & CHELL, attorneys).

MR. JOHN F. EVANS, JR. argued the cause for respondent The Township of Upper Pittsgrove (MR. WILLIAM R. SMITH, attorney).

MESSRS. WARE, CAULFIELD, ZAMAL & CUNARD, attorneys for respondents Emil W. Gallagher and Naomi A. Gallagher.

Appendix B—Opinion of Superior Court of New Jersey, Appellate Division

The opinion of the court was delivered by

LABRECQUE, J. A. D.

Plaintiff appeals from a judgment of the Chancery Division dismissing his complaint against defendants The Township of Elk, The Township of Upper Pittsgrove, Emil W. Gallagher and Naomi A. Gallagher, and awarding him compensatory damages of $1,200 and punitive damages of $500 against defendants Philip Franzen and John Franzen. The cross-appeal of the latter challenges the verdict against them.

On January 23, 1940 defendant John Franzen and his wife conveyed to their sons, plaintiff Edward Franzen and defendant Philip Franzen, jointly, a tract of land commonly known as the Mozenter farm. A portion of the lands comprising the farm was located in Upper Pittsgrove Township, Salem County, and the remainder (the larger portion) in Elk Township, Gloucester County. John continued to pay the taxes on the farm until 1947 when Edward moved into the farm house. During this period the only tax bills received were from Upper Pittsgrove Township. The trial judge found that in years gone by there had been a custom that the taxes on land located in two municipalities which abutted on county lines were assessed by the municipality in which the dwelling was located. During the period mentioned all parties were under the impression that the dwelling house on the Mozenter farm was located in Upper Pittsgrove Township.

After Edward Franzen moved into the house he continued to receive tax bills from Upper Pittsgrove Township

and paid them as received. He never received a bill from Elk Township.

Some time in the early part of 1941 Elk Township began to assess that portion of the farm, Block 270, Lot 40, located within its borders. For some reason not entirely clear, that portion of the farm was assessed in the name of Philip Franzen and the tax bills were sent to him. When asked what happened to them he said "the mice got them and chewed them up." In any event, he neither paid them nor told his brother about them. Since Edward was unaware that Elk Township was assessing part of the farm and thought that the farm dwelling was in Upper Pittsgrove Township he assumed that the tax bills from Upper Pittsgrove covered the whole farm and continued to pay them.

On June 28, 1945 Elk Township purchased a tax sale certificate for unpaid taxes for the year 1944 and prior years on the property. On August 14, 1952 it acquired title to the property through In Rem foreclosure proceedings of which Edward had no notice. On May 17, 1954 Philip Franzen purchased the tract from the township for $2,000. The first knowledge that Edward had of what had taken place was when Philip came upon the land with tractors some time after its acquisition from the township. There was an argument between the brothers followed by litigation to which reference will be made hereafter.

Philip conveyed the property to his father (as a straw) in 1958. In 1962 his father conveyed to the Gallaghers for a stated consideration of $2,400.

Gallagher purchased the property without a title or tax search. He testified that after he purchased it he visited the plaintiff who was still living in the farm house. At that time neither of them was sure as to just where the bound-

ary line was although plaintiff still assumed that the house was in Upper Pittsgrove. Shortly thereafter Gallagher had a survey made and ascertained for the first time that his purchase included the land on which the house was located. There was proof that a 1940 Elk Township map located the county (and township) line at a point which placed the house in Upper Pittsgrove Township but later maps, made after a 1949 survey, established the county line at a point which placed the house in Elk Township. The latter line was approved by Salem and Gloucester counties in 1950.

Edward brought the present action against the two municipalities, Philip Franzen, John Franzen and the Gallaghers. Originally he sought restoration of title to the lands in question, compensation for their use and for his expenses and costs in attempting to regain them, and punitive damages. Defendants Philip and John denied any breach of duty and asserted as additional defenses (1) plaintiff's asserted laches and (2) *res judicata* based upon a prior ejectment action by Philip against Edward. The pretrial order recited the issues as:

> "5. Plaintiff seeks restoration of title, or, in the alternative, damages relative to the loss of the title, and the fact that the defendants Philip and John Franzen conspired to defeat said title."

After a two-day hearing the trial judge awarded plaintiff damages against Philip and John in the sums mentioned and dismissed the complaint as to the remaining defendants. The damage award was based upon a finding that Philip had breached his fiduciary obligation as Edward's co-tenant to inform the latter of the Elk Township tax bills he had received, by reason of which the property had been lost by

tax foreclosure. The trial judge found that John had participated with Philip in a conspiracy to defeat Edward's rights in the property.

Plaintiff now challenges the dismissal of the suit against the two municipalities and the Gallaghers and seeks an increase in the amount of compensatory damages awarded him. By their cross-appeal, Philip and John challenge the judgment against them and alternatively contend that the verdict was excessive.

We affirm that portion of the judgment dismissing the complaint as against defendants The Township of Elk, The Township of Upper Pittsgrove, Emil W. Gallagher and Naomi A. Gallagher, substantially for the reasons set forth in the letter opinion of Judge Wick.

Defendants Philip and John Franzen first assert that since Edward had knowledge some time in 1954 of the tax sale and subsequent acquisition of the land by Philip, his delay in bringing suit until 1964 barred any recovery against them. Not so. We find no proof that prejudice to defendants resulted from the delay—actually the absence of such prejudice was conceded at oral argument. Absent a showing of prejudice plaintiff's delay did not defeat his claim. *Tynan v. Warren,* 53 N. J. Eq. 313, 321 (Ch. 1895); *Crandol v. Garrison,* 115 N. J. Eq. 11, 20-21 (Ch. 1933); *Cf. Notaro v. Notaro,* 38 N. J. Super. 311, 315-16 (Ch. Div. 1955).

In 1954, following his acquisition of title from Elk Township, Philip instituted suit to restrain Edward from coming upon the land and for damages.[1] When no answer was filed

[1] In addition, Edward brought suit to partition the portion of the farm located in Upper Pittsgrove Township and upon completion of the proceedings purchased Philip's interest therein.

a default judgment was entered enjoining Edward from coming on the land and awarding damages against him in the sum of $1,200. This judgment was eventually paid. Defendants argue that, since the present suit is brought for a cause of action involving the same subject matter, the disposition of the prior suit is *res judicata* and precludes any award of relief on plaintiff's present claim. We disagree.

In *Perth Amboy Dry Dock Co. v. Crawford*, 103 N. J. L. 440, 444 (E. & A. 1926), it was held, quoting from *Clark Thread Co. v. William Clark Co.*, 55 N. J. Eq. 658 (Ch. 1897):

> " 'The effect of an estoppel by judgment may present two aspects—one where a second suit between the same parties is brought for the same cause of action, the second where a second suit between the same parties is brought not for the same cause of action, but for a cause of action so related to the cause in the preceding suit that some matter, the establishment of which is essential to the recovery by the complainant in the last suit, was in issue and determined in the preceding suit.' "

And further:

> " 'When * * * a second suit is brought not for the same demand, but for a cause which was a part of the same matter, but was not included in the first action, the estoppel is not so sweeping. *In such instance only those issues which are common to both suits, and which had to be or were actually decided in the first suit,* are regarded as *res adjudicata* in the second.' " (Emphasis added.)

The fact that the prior judgment is entered by default in no wise affects its availability as a bar to a subsequent suit.

On the contrary, as between the parties, it is just as conclusive an adjudication of whatever is essential to support the judgment as one rendered after answer and contest. *Girard Trust Co. v. McGeorge*, 128 N. J. Eq. 91, 101 (Ch. 1940). However, a judgment by default does not estop a defendant as to matters which he might have effectively pleaded. *Texas Co. v. DeGaetano*, 71 N. J. Super. 413, 432 (App. Div. 1962), affirmed on other grounds 39 N. J. 120 (1963).

While the prior suit between the parties was concerned with the lands here involved, the resemblance stops there. That action did not involve any issue which was concerned with Philip's breach of his duty to disclose information to his co-tenant, Edward, or with Edward's right to damages for such breach. Thus the resolution of the issues posed by the pleadings in that action did not require the court to pass upon the contentions raised by Edward against Philip and John which gave rise to the judgment before us—nor were they passed upon. Since the rules did not make mandatory the assertion of Edward's present claim in the prior suit, he was free to do so here.

Our consideration of the proofs satisfies us that the trial judge's finding on the issue of the liability of Philip and John is supported by sufficient credible evidence present in the record, *State v. Johnson*, 42 N. J. 146, 161-62 (1964), and we turn to consideration of the amount of compensatory damages awarded.

The trial judge accepted the amount paid for the property by the Gallaghers, $2,400, as its true value and, since plaintiff had been deprived of his one-half interest therein, awarded compensatory damages of $1,200. Plaintiff contends that the facts compel a finding that the value of the

property greatly exceeded $2,400 but he produced no other proof of value. Defendants, on their cross-appeal, argue that since Philip paid $2,000 to the Township of Elk for a conveyance of the property, his profit on the sale to the Gallaghers amounted to but $400. Since he allegedly was also entitled to a credit for taxes paid on the property since he acquired it, it is said he actually made no profit. Such reasoning does not impress us. The allowance of damages was not to compel a sharing of the profit realized by Philip from the sale of the property but to reimburse Edward for the loss he sustained by reason of Philip's breach of his fiduciary duty as a co-tenant. It was of no consequence that in the carrying out of his scheme to deprive Edward of his rights in the property Philip incurred certain expenses including the cost of reacquisition and the taxes which he paid while he and his father were in possession thereof. He may not thus saddle his brother with part of the cost of carrying out his scheme. However, defendants should have been allowed an offset amounting to one-half of the taxes due at the time of the tax sale ($226.06) since Edward would have had to pay that amount to prevent the loss of the property, even had Philip notified him of the tax bills. Hence the award should have been $1,086.97 instead of $1,200.

The judgment of the Chancery Division is modified accordingly and, as modified, is affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

MORTIMER G. NEWMAN, JR.,
Clerk.

Appendix C—Opinion of Superior Court of New Jersey, Chancery Division

APPENDIX C.

OPINION OF SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION.

January 14, 1966.

Charles Camp Cotton, Esq., 1 So. Broad Street, Woodbury, New Jersey.
Joseph Mennite, Esq., 12 N. Broad Street, Woodbury, New Jersey.
William R. Smith, Esq., 191 East Broadway, Salem, New Jersey.
Harry R. Adler, Esq., 80 W. Broad Street, Bridgeton, New Jersey.
Martin F. Caulfield, Esq., 49 Delaware Street, Woodbury, New Jersey.

Re: Franzen v. The Twp. of Elk, et als.
Docket No. C-2843-63 Glou. Co.

Gentlemen:

In years gone by municipalities which abutted on county lines and with other municipalities in the more rural areas assessed the vacant or farm acreage in the municipality where the dwelling was located. Our early law recognized this as a problem and in 1918 passed what is now *R. S.* 54:4-25 which reads:

"Tract lying between two districts; how assessed

When the line between taxing districts divides a tract of land, each part shall be assessed in the taxing dis-

trict where located, unless the governing body of one of the taxing districts shall by resolution request that the entire tract be assessed by the adjoining taxing district in which a portion of the tract is located."

No resolution exists in this case.

Plaintiff herein, a former co-owner with his brother, relies on this custom and usage as the basis of this suit to create an estoppel against the taxing municipality wherein the disputed lands are situate.

Plaintiff with his brother Philip Franzen became cotenant of a farm which lies partly in Elk Township, Gloucester County and partly in Upper Pittsgrove Township, Salem County. For many years up until the respective counties actually had the county line surveyed and monumented in 1950, plaintiff and the taxing authorities of Upper Pittsgrove believed the house and outbuildings to be actually located in that township. The survey placed the buildings in Elk Township. Plaintiff's parents conveyed the premises to Philip and Edward Franzen by deed dated January 23, 1940.

Taxes were assessed by Upper Pittsgrove in the name of John Franzen, their father, from the year of his purchase in 1938 until 1949 when the assessment read Philip and Edward Franzen. Plaintiff testified and the court finds as fact that he resided at his parent's home with his brothers and sisters until 1947 when he married and moved into the dwelling on the farm conveyed to he and his brother, that during all this time he saw to it that his father John paid the taxes assessed to Upper Pittsgrove Township. During these years the lands were assessed as 13 acres of unimproved lands, 42 acres of improved lands and $700. for improvements. In 1952 the assessment was for 29 acres of

improved lands and $700. for improvements, continued so thru 1957, then for 1958 the assessment was 13 acres of improved lands and $500. for improvements which continued thru 1962, and in 1963 was 14½ acres of improved lands and nothing for improvements thru 1965.

Elk Township's assessment records are as follows:

1941 Franzen (Philip) 48 acres $1400. Improvements $1000.
1942 Mozenter, Michael and Harrison 48 acres $500.
1943 Franzen, Philip 48 acres $500.
1944 Franzen, Phil et als. 48 acres $500.
Same for 1945 and 1946
1947 Franzen, Philip 48 acres $500.
Same for 1948
1949 Franzen, Philip 48 acres $1000. Improvements $200.
Same for 1950
1951 Franzen, Philip 42 acres $1000. Improvements $200.
Same for 1952
1953 & 1954 Elk Township 42 acres.
1955 Franzen, Philip 42 acres $1000.
Same for 1956, 1957 and 1958.
1959 Franzen, John 42 acres $1000.
1960 Franzen, John 42.5 acres $7550.
Same for 1961
1962 Franzen, John 42.5 acres $2275.
1963 Gallagher, Emil 42.5 acres $2275.
Same for 1964
1965 Gallagher, Emil 42.5 acres $2275. Improvements $500.

Elk Township acquired tax sale certificate No. 197A under date of July 5, 1945 as the result of a tax sale held on June 28, 1945 on lands designated as Lot 40, Block 270 for taxes

assessed thereon to Philip Franzen as the owner for the year 1944. Thereafter a final judgment in an In Rem foreclosure was entered on August 14, 1952.

Thereafter the Township of Elk by deed dated May 7, 1954, conveyed the premises foreclosed to Philip Franzen for a consideration of $2000.00 pursuant to a public sale held by said Township. Then on August 8, 1958, Philip Franzen conveyed said lands to his father John Franzen, and on January 26, 1962, John Franzen conveyed the premises to Emil W. Gallagher and Naomi A. Gallagher, his wife.

Maps were introduced into evidence. The first, an Elk Township tax assessment map prepared as a P.W.A. project and dated January 1940, filed with the State Tax Department under date of May 1, 1940; the second the Tax Map of Upper Pittsgrove Township dated March 10, 1961, revised September 30, 1961, filed with N. J. Department of the Treasury Division of Taxation under date of May 1, 1961; Map showing a portion of County Line between Gloucester and Salem Counties, surveyed 1949 under the supervision of Harry H. Skinner, County Engineer of Salem County and approved by the two County Boards of Freeholders under dates of May 17, 1950 and May 18, 1950. A study of the latter two does show a change in the line from that of the earlier Elk Township Tax Map.

Dwight W. Fisher an engineer and licensed land surveyor called by plaintiff testified that if the 1940 Elk Township map was used the buildings were located in Upper Pittsgrove Township, but if the 1961 Upper Pittsgrove Township and the map showing the 1949 survey of the county line were used the buildings were located in Elk Township.

Plaintiff testified that his parents bought the farm in 1938, that it was deeded to he and his brother Philip in

1940, all lived at home and farmed it together until 1947 when their mother died. Then plaintiff moved onto the farm and Philip remained at home. The tax bill was from Upper Pittsgrove Township to the father John who paid them up to the date of the mother's death and thereafter plaintiff paid them to Upper Pittsgrove Township. He testified he never received or saw any tax bills from any other Township. That he owned other lands which also lie partly in Elk Township and partly in Upper Pittsgrove Township for which he received tax bills from Elk Township which he paid. Said bills were addressed to him at Monroeville, New Jersey. He first learned of the assessment of the lands in question by Elk Township in 1954 or 1955 and had paid taxes on the other lands up to this time, and that he received no notice of the tax sale in 1945.

Thereafter in 1955 his brother Philip came to the Elk Township land with tractors evidently to do some work thereon and told plaintiff he owned the land. Plaintiff kept Philip off the land and hired an attorney to look into the matter, continuing to live on the land until defendant Gallagher through the Township attorney advised plaintiff of his ownership of said lands and then plaintiff and his wife moved therefrom.

Plaintiff testified that it had always been his understanding that taxes were assessed and paid to the municipality wherein the dwelling house of the farm stood, that he had inquired of others and was told the same thing. He further testified that after the survey of 1949 locating the county line no official of either Township ever talked with him or sent him notice of any changes in assessments, or the actual location of the county line. And most particularly that Philip never told him of any delinquent taxes due the

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Township of Elk, or later that Philip was going to or did repurchase the Elk Township lands from the Township after the foreclosure. That not until thereafter did he check the Township records to learn that the lands were assessed in Philip's name.

This farm and another acquired in 1938 by plaintiff of 111 acres likewise located in both Townships were farmed by all the family until 1947 from which time plaintiff alone farmed the lands and Philip went to work for R. C. A. in Camden.

Two prior suits between Edward and Philip have been in the courts. The first by Philip against Edward resulted in a money judgment for $1200. and costs and a restraint relative to trespass on lands of the plaintiff. This judgment was paid after execution. Another suit by Edward against Philip for partition of the Upper Pittsgrove Township portion of the original farm resulted in judgment for Edward with certain adjustments for taxes and as a result of which Edward paid certain monies to Philip for full title to said lands. No mention in that suit was made respecting the present issues raised against Philip, plaintiff stating that his then attorney said it would be too complicated.

As to defendant Gallagher plaintiff testified that Gallagher first came to see him in January 1962 saying first that he had bought the Elk Township land and then that he was going to buy the land, that he told Gallagher how crooked the law was, that the county line was 300 feet behind the house, meaning the house was in Upper Pittsgrove Township, told him about the tax dispute and that if he, Gallagher, bought he would be involved in litigation, that if he bought he could not cross his lands to get to the property, that Gallagher said he would buy other lands for access.

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Helen S. Franzen, plaintiff's wife, corroborated his testimony as to the Gallagher incident.

Philip Franzen testified that prior to 1947 all lived together at home and farmed the land, that there were many discussions relative to the payment of taxes which were then paid by their father John; that for about 5 years he paid taxes on the Upper Pittsgrove part of the land. That he went to work at R. C. A. in January 1946, had done no farming since, never talked with his brother Edward since 1947 and that Edward since that time had never attempted to see him. That he bought the Elk Township lands at the public sale in 1954 for $2000., was chased off by Edward and that after 1947 Edward did not talk with their father John. That he knew taxes were assessed against the land by Elk Township and that the property was sold at the tax sale in 1945. He testified that he received tax bills from Elk Township and when asked what happened to them stated "The mice got them and chewed them up." That he received a final notice of unpaid taxes but did not tell his brother Edward, that he was not paying the taxes assessed. He further stated "I can't help it if Edward did not get his bills."

Emil Gallagher testified he became interested in buying the property in the Fall of 1961 for his son-in-law because it was adjacent to other of his lands, that John Franzen offered it to him and he bought it, getting the deed on January 29, 1962, that after he bought it he talked with Edward and his wife, actually did not know whether he had bought the buildings so he hired Skinner to make survey and then discovered he had bought the buildings, then in terrible condition, that when he talked with plaintiff and his wife they told him the county line was 15 feet to the rear of the buildings and that it was the dividing line of the property.

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He paid $2400. to John for the land, then bought the adjoining Mulford Estate lands for access, from the Township for $3800.

The gist of plaintiff's action against Elk Township for a return of the land or in lieu thereof damages is that in the in rem foreclosure proceedings no notice was given plaintiff, no opportunity by notice for redemption, no notice of the public sale of the lands and that it entered into an illegal agreement with Upper Pittsgrove Township concerning the location of the county line without notice to plaintiff of his liability for taxes.

The rules relative to notice of pendency of In Rem foreclosure proceedings required only an advertisement in a newspaper published in the community wherein the lands lie, no personal service, *R. R.* 4:82-7. As to redemption, prior to the tax sale, notice of such sale was required of four insertions in a newspaper of local coverage, and as to the public sale of the lands after foreclosure, again public notice by newspaper was required by the statute. No evidence that these publications were not made as required was offered so that the court is obliged to assume such publications were made.

As to the alleged illegal agreement with Upper Pittsgrove Township regarding the survey of the county line and the actual determination that the buildings were in Elk Township rather than Upper Pittsgrove Township the evidence discloses that taxes were assessed by Elk Township in 1941 to Philip, one of the cotenants, for 48 acres at $1400. and improvements of $1000. The fact that the assessment was in the name of only one cotenant and not both or that Philip was sent the bill and not Edward cannot benefit the plaintiff. *R. S.* 54:4-64 in part reads "The validity of any

tax or assessment, or the time at which it shall be payable, shall not be affected by the failure of a taxpayer to receive a tax bill, but every taxpayer is put upon notice to ascertain from the proper official of the taxing district the amount which may be due for taxes or assessments against him or his property."

The gist of plaintiff's action against Upper Pittsgrove Township for damages is the same illegal agreement concerning the location of the county line without notice and that it continued to assess taxes on the land after knowing the location of the county line thereby luring plaintiff into a false position resulting in the loss of the land.

The survey of the county line was approved by the respective Boards of Freeholders by their Directors and Clerks on May 17, 1950 and May 18, 1950. Minutes of the township committees of Elk and Upper Pittsgrove show that their assessors and committeemen were active in dividing the overlapping assessments during 1951 and 1952, with changes in acreage shown on both tax bills for 1951 and 1952. These changes would alert the ordinary person to inquire and if aggrieved prompt an appeal to the county tax board. This would be the only remedy. Of course, the court is mindful that during this period only Philip was receiving the Elk Township bill and was apparently unconcerned about payment of taxes or the rights of his brother Edward, his cotenant.

No evidence has been presented which would lead the court to conclude that the Townships of Elk and Upper Pittsgrove by their elected or appointed officials have entered into any illegal agreement to deprive plaintiff of his rights in the land. His troubles all stem from the lack of communication with his brother Philip. The survey of 1949

did not change the location of the county line, merely identified upon the land and was further monumented. The law presumes that all owners of land know that taxes are assessed and are payable for each year. Owners have the duty and responsibility of inquiry. Here because of the ownership in two municipalities each cotenant had this responsibility and cannot rely on erroneous tax bills.

As to plaintiff's claim against his father John and brother Philip this court must recognize the duties and responsibilities of cotenants. Philip by receiving the tax bills from Elk owed the duty to Edward to advise him thereof and certainly if he were not going to pay the taxes give Edward the opportunity to do so. This failure to so advise Edward of the taxes due resulted in the foreclosure of the tax lien imposed thereon. If this was not enough, his purchase of the lands later at the public sale for his own benefit further compounded the wrong. Philip now defends his position upon Rules 4:13-1 and 4:78-8 which require a party to assert by counterclaim any cause of action he may have against the plaintiff, as well as laches. Plaintiff testified that since obtaining the information relative to the In Rem foreclosure and public sale he has consulted no less than 20 lawyers seeking help and assistance until finally successful in getting the services of present counsel. That in the partition suit involving the Salem County lands he could not persuade his then attorney to bring up such an action. Further, that in the first suit by his brother for possession of these lands and the crops thereon which resulted in an injunction and money damages of $1200., that judgment was entered by default for the reason that two attorneys hired to defend the action did not file an answer on his behalf.

This is a court of equity and while the rules are applicable

here as elsewhere I feel that the action of Philip was so reprehensible in not disclosing to Edward that taxes were due, that I should not because of the rules or the mere passage of time eliminate Philip from responsibility. I must also hold that when his father John accepted the deed from Philip which was later transferred to Gallagher that John was participating with Philip in a conspiracy to defeat any rights which Edward may have had in the lands or the proceeds thereof. Philip bought these lands for $2000. and John sold to Gallagher for $2400. If this is an indication of value and the court accepts it as such, then Edward has been deprived of value to the extent of $1200. I realize that the lands cost Philip $2000. to purchase but if he had advised Edward of the taxes due the land would still be his in one half ownership subject to his share of the taxes.

Edward should recover from Philip the sum of $1200. and from both Philip and John because of his participation with Philip, punitive damages by joint assessment of $500., plus taxed costs.

As to Gallagher, he purchased from John without any knowledge of the dispute between the brothers and the townships and must be adjudged an innocent purchaser for value without notice.

A judgment in accordance with these conclusions will be entered upon submission thereof, containing consents of all counsel as to form.

Very truly yours,

JOHN B. WICK.

JBW:mha

Appendix C—Substitution of Attorney

P. S. Plaintiff's exhibits P-1 to P-16 inclusive are enclosed herein.

Mr. Adler attached please find exhibits DF-1, DF-2 and DF-3.

SUBSTITUTION OF ATTORNEY.

It is stipulated and agreed that Carlton W. Rowand, Esq., 116 N. 7th Street, Camden, New Jersey, be substituted as attorney of record for the plaintiff, Edward Franzen, in place and stead of Charles Camp Cotton, Esq.

/s/ CARLTON W. ROWAND,
/s/ CHARLES CAMP COTTON.

Dated: Jan. 13, 1967.

APPENDIX D.

PERTINENT STATUTES.

New Jersey Revised Statutes, Section 54:4-23, as amended by P. L. 1933, Chapter 120, Section 3,

"The assessor shall ascertain the names of the owners of all real property situate in his taxing district, and after examination and inquiry, determine the full and fair value of each parcel of real property situate in the taxing district at such price as, in his judgment, it would sell for at a fair and bona fide sale by private contract on October 1st next preceding the date on which the assessor shall complete his assessments, as hereinafter required."

New Jersey Revised Statutes, Section 54:4-64,

"As soon as the tax duplicate is delivered to the collector of the taxing district, as provided in section 54:4-55 of this title, he shall at once begin the work of preparing, completing, mailing or otherwise delivering tax bills to the individuals assessed, and shall complete that work at least two months before the third installment of taxes falls due. He shall also, at least two months before the first installment of taxes for the year falls due, prepare and mail, or otherwise deliver to the individuals assessed, a tax bill for such following first and second installments, computed as hereinafter provided at one-half of the complete tax last previously levied. The validity of any tax or assessment, or the time at which it shall be payable, shall

not be affected by the failure of a taxpayer to receive a tax bill, but every taxpayer is put upon notice to ascertain from the proper official of the taxing district the amount which may be due for taxes or assessments against him or his property."

New Jersey Revised Statutes, Section 54:5-104.42, as amended by P. L. 1948, Chapter 96,

"The copy of the petition filed in the office of the county recording officer and the publication of the notice as hereinafter provided, shall be notice to the world including all persons claiming any right, title, interest in or lien upon the land sought to be affected by said petition, whether the names of said persons appear in said petition or not, of the institution of said foreclosure proceedings in rem, and that unless said lands be redeemed in the cause as hereinafter provided, the right, title, interest or lien of any such persons and the claim of any or all other persons, whether such right, title, interest, lien or claim has or shall have become vested or shall have arisen or may arise prior to or subsequent to the filing of said petition, shall be foreclosed and forever debarred and that an indefeasible estate in fee simple in said lands shall be vested in the petitioner, by the decree of the said court, as provided in this act."

Appendix E—Pertinent Portions of Final Judgment of Foreclosure

APPENDIX E.

PERTINENT PORTIONS OF FINAL JUDGMENT OF FORECLOSURE.

"It appearing by affidavit filed herein that the 'Notice of In Rem Foreclosure of Tax Lien Titles' was published once on June 26, 1952, in the 'Glassboro, N. J. Enterprise'.

* * * * * * * * *

"It appearing that the plaintiff has fully complied with the provisions of the In Rem Tax Foreclosure Act (1948);"